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No. 06-1720

IN THE SUPREME COURT OF THE UNITED STATES

LOUISE ELIZABETH HURST,
Petitioner
v.
TEXAS DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES, *ET AL*
Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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Ms. Hurst files this reply to clarify matters that DARS' arguments confuse. This Court should grant certiorari because this case raises an important question of federal law that has not been, but should be, clarified by this Court. Supreme Court Rule 10(c). DARS' Response at 4-5.

I. TITLE I OF THE REHABILITATION ACT CLEARLY SUBJECTS STATES TO SUIT.

Congress may overcome Eleventh Amendment immunity "in statutory text that clearly subjects States to suit ... though without explicit reference to state sovereign immunity or the Eleventh Amendment." *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring). DARS' Response at 7. This is exactly what Congress has done in Title I of the Rehabilitation Act, 29 USC Section 701 - 751.

A. This Statute Is *Not* A General Authorization For Suit.

The provision at issue here, 29 USC 722 is *not* "precisely the kind of 'general authorization for suit in federal court' that this Court rejected as being insufficient to waive Eleventh Amendment immunity." DARS' Response at 11 – 12. In its argument, DARS relies on *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989), which in turn relies on *Atascadero v. Scanlon*, 473 U.S. 235, 246 (1985). But, the Rehabilitation Act differs very significantly from the statutes at issue in *Atascadero* and *Dellmuth*. *Atascadero* itself reasons that Section 505 of the Rehabilitation Act

> provides remedies for violations of [Section 504 of the Rehabilitation Act] by '*any* recipient of Federal assistance.'... [G]iven their constitutional role, the States are not like any other class of recipients of federal aid. A

> general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

Atascadero, 473 U.S. at 245 – 246 (emphasis added by the Court).

B. The Rehabilitation Act Makes Numerous References to the State.

Thus, the statute discussed in *Atascadero* differs from the statute at issue here for two important reasons. First, the *Atascadero* statute does not even mention States.

In contrast, the statute at issue in this case makes "numerous references to 'State'" which make Congressional intent "indubitable." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 57 (1996). The text of Title I as a whole contains 551 references to "State" including 87 references to "designated State unit" and fifty references to "designated State agency." 29 USC 701 – 751. It sets out detailed requirements for state rehabilitation plans, including requirements for administrative mediation, administrative hearings, judicial review, and burden of proof, and conditions receipt of funding on compliance with those conditions. Specifically, the text of 29 USC 722 contains 62 references to "State" including thirty references to "designated State unit" and seven references to "designated State agency." 29 USC 722. More specifically, 29 USC 722(c)(5), entitled "Hearings" and being the portion of the Act of which the judicial review provision at issue here is a subsection, contains 20 references to "State" including seven references to "designated State unit" and two references to

"designated State agency." 29 USC 722(c)(5); *see* DARS' Response at 13-14.[1]

C. The Rehabilitation Act Is Unambiguous Because It Authorizes Suit Only Against A State.

Second, and importantly, unlike the statutes in *Atascadero* and *Dellmuth*, the statute at issue here *only* addresses States. Congress directed federal funds specifically and only to States, and did not allow any other local or private entity to accept these funds. In this way, the Rehabilitation Act is fundamentally different from the statutes at issue in *Dellmuth* and *Atascadero*. The statute in *Atascadero* attempts to permit suit against "*any* recipient of Federal assistance." *Atascadero*, 473 U.S. at 245 (emphasis added by the Court). And in *Dellmuth* "the States *along with local agencies* [were] logical defendants." *Dellmuth*, 491 U.S. at 232 (emphasis added). Thus, the judicial review provisions of the *Atascadero* and *Dellmuth* statutes are at best ambiguous because many entities could be subject to suit. In this case, however, State entities are the *only* possible defendants in a suit pursuant to 29 USC 722(c)(5)(J), because Congress permits only States to accept these funds.

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[1] Of course, Eleventh Amendment analysis is "not guided by a single sentence or member of a sentence, but look[s] to the provisions of the whole law...." *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 18 (1980). The DARS comparison to the Indian Gaming Regulatory Act is thus misleading because DARS references only one subsection of the Rehabilitation Act (i.e. 29 U.S.C. Section 722(c)(5)(J)(i)) rather than numerous provisions as the Court evaluated in *Seminole Tribe*, 517 U.S. at 56 - 57.

II. LIKE THE TELECOMMUNICATIONS ACT, TITLE I OF THE REHABILITATION ACT CLEARLY AND UNAMBIGUOUSLY SUBJECTS STATES TO SUIT.

DARS' attempts to distinguish the case at bar from *AT&T Comm. v. Bellsouth Telecomm.*, 238 F.3d 636 (5th Cir. 2001), and *MCI Telecoms. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323 (7th Cir. 2000) by arguing that the Telecommunications Act of 1996 deals with "waiver of Eleventh Amendment immunity under the Commerce Clause rather than the Spending clause" at issue here. But, DARS states that the "analysis is similar" under both clauses and that in both contexts there "must be a clear statement of intent" to find waiver. Response at 12 – 13.

"Clear statement" analysis ought to be the same whether Congress enacts a statute using its Commerce Clause or Spending Clause authority. Adopting DARS view that the analysis is "similar," rather than the same, creates uncertainty and confusion around how the two are dissimilar. Indeed, "this Court has recognized that the standard for what is a 'clear statement' test applied to Congressional enactments is the same for both" abrogation in Eleventh Amendment immunity under the Fourteenth Amendment and waiver through the Spending Clause. DARS' Response at 10 (citing *Atascadero*, 473 U.S. at 247). Providing the same standard for "clear statements" in the preemption context and in Spending Clause legislation would further clarify the analysis to be applied to determine whether a statute requires waiver of Eleventh Amendment immunity. Here, since Congress directs Rehabilitation Act funds to States - and only States - the Act's judicial review provision is unambiguous. When a State accepts the funds, it is clearly

on notice that it is subject to suit in federal court. 29 USC Section 722(c)(5)(J).

In addition, DARS notes that this Court did not decide whether the State waived its Eleventh Amendment immunity in *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland,* 535 U.S. 635 (2002). Response at 15 – 16. *Verizon* clearly reserves this Eleventh Amendment waiver issue for another case and another day. The day has come when the Court should examine the issue directly and Ms. Hurst's Petition presents the issue.

III. PETITIONER MS. HURST DOES NOT ADVOCATE "SOMETHING LESS THAN A CLEAR STATEMENT."

Moreover, Ms. Hurst does not contend that "something less than a clear statement" is required to condition federal funding on waiver of Eleventh Amendment immunity. DARS' Response at 15. Nor would adoption of Ms. Hurst's position reintroduce a "subjective standard" for determining whether a statute contains a clear statement of intent to condition receipt of federal funding on waiver of Eleventh Amendment immunity. DARS' Response at 16. Rather, this case presents the precise situation of a statute that unambiguously conditions a State's acceptance of federal funding on waiver of Eleventh Amendment immunity without mentioning words such as "Eleventh Amendment," "waiver," or "immunity." Acknowledging this fact would clarify rather than confuse this Court's Eleventh Amendment jurisprudence and would certainly not introduce a "subjective standard" to the "clear statement" analysis.

DARS also relies on several decisions that do not support its position. *See* Response at 4. First, unlike the Rehabilitation Act, the statute at issue in *Pennhurst,* 451 U.S.

at 19, "does no more than express a congressional preference.... and, as such, is too thin a reed to support ... rights and obligations." To the contrary, the Rehabilitation Act explicitly creates "rights and obligations." Without elucidating each statutory reference, the Rehabilitation Act sets out criteria for eligibility, and states that a "designated State unit *shall* complete the assessment for determining eligibility...." Section 722(a)(emphasis added). Furthermore, the "designated State unit *shall* complete the assessment for determining eligibility... and *shall* provide ... information ... including ... a description of the full range of components that *shall* be included in an individualized plan for employment." Section 722(b)(emphasis added).[2]

IV. CONCLUSION.

Petitioner Hurst respectfully asks this Court to grant her petition for a writ of *certiorari* and to reverse the decision of the lower court.

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[2] *United States v. Bass*, 404 U.S. 336 (1971) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) do not support DARS' analysis. *See* Response at 4. First, although both decisions discuss the relationship between the United States and States, neither case addresses the Eleventh Amendment. *Bass* gives a narrow meaning to an ambiguous criminal statute to ensure a "'fair warning of ... what the law intends to do if a certain line is passed,'" and because of the "'instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348. *Rice* addresses the scope of the United States Warehouse Act.

Moreover, both cases resort to legislative history to interpret statutes. *Rice*, 331 U.S. at 244 – 247; *Bass*, 404 U.S. at 341 – 347. By contrast, the terms and structure of Title I of the Rehabilitation Act by themselves clearly subject States to suit upon acceptance of federal funds. No resort to legislative history is required. *Dellmuth*, 491 U.S. at 230 (rejecting use of legislative history as "irrelevant" and "unnecessary").

Respectfully submitted,

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